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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE ESTATE)
OF BERNICE REBA RAINEY,)

DEAN RAINEY AND WILLIAM RAINEY,)

Appellants-Respondents,)

vs.)

JERRY L. RAINEY, PERSONAL)
REPRESENTATIVE,)

Appellees-Petitioners.)

No. 47A04-0707-CV-378

APPEAL FROM THE LAWRENCE CIRCUIT COURT
The Honorable Richard D. McIntyre, Judge
Cause No. 47C01-0605-ES-52

April 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After Bernice Reba Rainey (“Reba”) passed away, leaving several surviving children and multiple grandchildren, her son Jerry L. Rainey became the personal representative of her estate pursuant to the terms of her will. A dispute over the disposition of property ensued, and William W. Rainey (“Bill”) and Robert Dean Rainey (“Dean”) petitioned for Jerry’s removal as personal representative of the estate. The trial court denied the petition. Finding that Jerry did not breach his fiduciary duty to the estate by distributing mementos of limited monetary value, that he did not engage in self-dealing, and that Jerry is not an unsuitable personal representative, we conclude that the trial court did not abuse its discretion by denying the petition for removal. We therefore affirm.

Facts and Procedural History

Reba executed a will on February 21, 1984. The will provided, in part:

ITEM IV

BEQUEST TO GRANDCHILDREN

I have a roll of Buffalo nickels which I bequeath to my grandchildren to be divided as nearly equally as possible among them.

ITEM V

SPECIFIC BEQUEST TO CHILDREN

If my husband does not survive me by at least thirty (30) days, I bequeath the dishes which belonged to our children’s Grandmother Turpen to our children to be divided among them as they see fit.

I also bequeath our household goods and personal effects to our children to be divided among them as they see fit if my husband does not survive me by at least thirty (30) days.

ITEM VI

BEQUEST OF RESIDUE

All of the rest, residue and remainder of my estate, both real and personal, remaining after the preceding Items of this Will are carried out, I

hereby devise and bequeath to our children, CAROLYN SUE OWENS, WILLIAM WESLEY RAINEY, RALPH HOWARD RAINEY, JERRY LAWRENCE RAINEY, JOHN EDWARD RAINEY and ROBERT DEAN RAINEY, in equal shares to have and to hold as their property absolutely.

If any child of mine does not survive me, I devise and bequeath his or her share in my estate to his or her surviving children in equal shares to have and to hold as their property absolutely.

Appellant's App. p. 9-10. The will further provided that, if Reba's husband predeceased her, their sons Ralph and Jerry would serve as co-executors of her will. *Id.* at 10. Reba's husband passed away in 1987, and Ralph passed away in May 2005. Reba passed away on February 25, 2006. Jerry was subsequently named personal representative of her estate.

After Reba's funeral, her extended family gathered informally in her home. Jerry and his wife offered mementos from his mother's belongings to all family members who were present, including grandchildren and in-laws. They kept a handwritten list of the items distributed to each person. Several heirs were not present during this gathering, but Jerry later contacted them and offered them mementos from the estate. In the days following Reba's funeral, Jerry suggested to Bill that he take \$20 in KFC gift certificates that Bill had purchased for Reba before her death. However, Bill declined to accept the gift certificates or any mementos, believing that these items were part of Reba's estate and could not be distributed by Jerry. Tr. p. 86. After this initial disbursement, Bill voiced his objection several times to Jerry. Dean, who was not present for the funeral-day gathering, also contacted Jerry to voice his objection to the distribution of mementos. Following these contacts, Jerry retrieved several quilts that had been given to relatives and preserved them within Reba's estate.

Reba's heirs held a meeting during which they decided to have Reba's remaining assets appraised and then auctioned during a private family auction. Each heir was represented at the auction. During the auction, Bill and Dean noticed that several of Reba's possessions were not included. These items were cookbooks, the KFC gift certificates, a cast iron string holder, tea cups and saucer sets, and a collection of angel figurines. Appellants' Br. p. 9-10. While the cookbooks, gift certificates, and string holder were at that time in Jerry's possession, he later presented the cookbooks¹ and string holder to the other heirs for them to take and reimbursed the estate for the \$20 value of the gift certificates. Of the items sold during the auction, Bill acquired his father's pocket watch, and Dean acquired his father's tool box and its contents. Upon later inspection, however, both men questioned whether these items were actually their father's or had been acquired by their mother after his death in 1987. Sometime after the auction, Jerry located a small safe containing coins that had belonged to Reba. Using the price paid for a similar safe at the family auction as a reference point, Jerry paid \$50 for the safe. He then divided the coins for equal distribution among the heirs. Tr. p. 52-53.

Almost a year after the family auction, Bill and Dean filed a petition for the removal of Jerry as the personal representative of Reba's estate. The petition contended that Jerry breached his fiduciary duty by failing to preserve the assets of the estate and being dishonest with the other heirs and failing to keep them apprised of the status of the estate's administration. Appellants' App. p. 22. The trial court denied the petition, and Bill and Dean now appeal.

¹ It was later determined, upon Jerry's investigation, that one of the missing cookbooks had actually been given by Reba to a granddaughter as a wedding gift. Tr. p. 56.

Discussion and Decision

The parties raise several issues on appeal, which we rephrase as whether the trial court abused its discretion by denying the petition for Jerry's removal as personal representative of Reba's estate. We review a trial court's ruling upon a petition for the removal of a personal representative only for an abuse of discretion. *Pope by Smith v. Pope*, 701 N.E.2d 587, 590 (Ind. Ct. App. 1998). "An abuse of discretion may occur if the trial court's decision is clearly against the facts and circumstances before the court, or if the trial court has misinterpreted the law." *Bridgestone Americas Holding, Inc. v. Mayberry*, 878 N.E.2d 189, 191 (Ind. 2007) (citation omitted). We recognize the trial court's "broad discretion" over the removal of the personal representative of an estate. *Estate of Sandefur*, 685 N.E.2d 719, 722 (Ind. Ct. App. 1997). Additionally, we note that the appellants are appealing from a negative judgment. We "will set aside a negative judgment as contrary to law only when the evidence is without conflict and all reasonable inferences to be drawn therefrom lead to but one conclusion and the trial court has reached a different one." *Grubnich v. Renner*, 746 N.E.2d 111, 119 (Ind. Ct. App. 2001) (quotation omitted), *trans. denied*.

The removal of personal representatives is governed by Indiana Code § 29-1-10-6, which provides in part:

When the personal representative becomes incapacitated (unless the incapacity is caused only by a physical illness, infirmity, or impairment), disqualified, unsuitable or incapable of discharging the representative's duties, has mismanaged the estate, failed to perform any duty imposed by law or by any lawful order of the court, or has ceased to be domiciled in Indiana, the court may remove the representative as provided:

- (a) The court on its own motion may, or on petition of any person interested in the estate shall, order the representative to appear

and show cause why the representative should not be removed. Such order shall set forth in substance the alleged grounds upon which such removal is based, the time and place of the hearing, and may be served upon the personal representative in the same manner as a notice is served under this article.

Ind. Code § 29-1-10-6. Here, Bill and Dean, as interested parties, petitioned the trial court for the removal of Jerry as the estate's personal representative, and the court held a hearing on the petition. In their petition and on appeal, Bill and Dean contend that Jerry failed to preserve the assets of the estate, was dishonest with the other heirs, and failed to keep them apprised of the status of the estate's administration. Appellants' App. p. 22. In other words, they argue that Jerry breached his fiduciary duty to the estate and heirs by (1) mismanaging the estate by failing to preserve assets and by engaging in self-dealing and (2) communicating poorly with the other heirs such that he is unsuitable to discharge the representative's duties.

I. Whether Jerry Mismanaged the Estate and Engaged in Self-Dealing

Bill and Dean argue that Jerry mismanaged Reba's estate and should be removed as personal representative. *See* I.C. § 29-1-10-6. Specifically, they contend that he failed to preserve the estate's assets by distributing mementos to non-heirs and by engaging in acts of self-dealing. In support of their self-dealing claim, Bill and Dean point to evidence that Jerry removed several items to his own home and used the KFC gift certificates. They frame Jerry's conduct as a breach of his fiduciary duty toward the estate.

As we have previously recognized, "a personal representative is regarded as a trustee appointed by law for the benefit of and the protection of creditors and distributees

of that estate.” *In re Bender*, 844 N.E.2d 170, 178 (Ind. Ct. App. 2006), *trans. denied*. The personal representative of an estate “has a duty to protect and preserve the assets of the estate to properly distribute those assets to the rightful heirs and devisees of the decedent.” *Estate of Daniels ex rel. Mercer v. Bryan*, 856 N.E.2d 763, 768 (Ind. Ct. App. 2006). He or she must ensure that the estate’s assets “are not wasted or mismanaged.” *Ind. Dep’t of State Revenue v. Estate of Cohen*, 436 N.E.2d 832, 836 (Ind. Ct. App. 1982). Additionally, “[t]here is a thread which runs through the law governing fiduciary relationships which forbids a person standing in a fiduciary capacity to another from profiting by dealing in the property of his beneficiary, and any such profit realized must be disgorged in favor of that beneficiary.” *Bender*, 844 N.E.2d at 178. Where a personal representative has failed to act in accordance with his or her duty to the estate and heirs, a court may find that the personal representative should be removed for mismanagement of the estate or for failing to perform duties imposed by law. *See* I.C. § 29-1-10-6.

Here, despite Bill and Dean’s assertion in their appellate brief that Jerry “admitted at the hearing of this matter that he has violated this [fiduciary] trust,” Appellants’ Br. p. 18, it is apparent that he made no such admission. Instead, Jerry argued that he acted with care to locate and preserve the assets of the estate, to reasonably accommodate the wishes of the various heirs, and to properly value items of property.

The crux of Bill and Dean’s argument that Jerry mismanaged the estate is that Jerry improperly gave mementos to grandchildren and in-laws who were not Reba’s legal heirs. The evidence reflects that, after Reba’s funeral, Jerry distributed mementos of limited monetary value to members of the family, and we decline to find that doing so

constituted waste or mismanagement of the estate. On cross-examination during the hearing on this petition, Jerry explained:

A Several of the grandchildren, children and grandchildren, were from Michigan, New York, wherever, and it was my feeling that they needed . . . They were close to my mother, all of the grand . . . We were a close family and it would be very nice for them to have a memento of their grandmother to take home with them.

Q Okay, and what was the purpose, to let people who weren't necessarily heirs but were part of the family have something of your mother's? It was either their grandmother or their mother-in-law or . . . ?

A That's correct, that's correct.

Q And the mementos that were given out, in your opinion, did they have any substantial value?

A No, no substantial value, no.

Q Now there was a mention of some quilts, two of those were given out that day, is that right?

A They were quilts allowed to leave the house but they were to grandchildren that lived locally.

Q Okay, and because of the complaint that was made about that, were they retrieved or returned?

A I made a mention to them that there was an issue that had been brought up and that I would very much appreciate their return and they were returned.

Q The other items that were kept, do you believe they had any substantial value?

A No sir.

Tr. p. 46-47.² Rather than conducting a “free-for-all” giveaway of Reba’s property, *id.* at 16, Jerry kept a list of the recipients of the mementos, and the list indicates that the appellants, their spouses, and children were all included in the distribution of keepsakes, Appellants’ App. p. 26. Subsequent to this initial distribution, Jerry attempted to

² Jerry’s characterization of the mementos as having insubstantial monetary value was reiterated by another heir at the hearing on this petition. John Rainey testified that the disbursed items were “costume jewelry and any memento. It wasn’t anything of any real value unless it was sentimental value.” Tr. p. 194. John testified that “[t]he only thing that could have been [of monetary value] . . . would have been . . . two rings . . .” *Id.* However, as later explained, the heirs *jointly* decided to allow two granddaughters to have these rings.

alleviate concerns by retrieving two quilts that had been given as mementos. He also discussed the return of two pieces of jewelry by granddaughters, but Reba's heirs decided together that the granddaughters could have the jewelry. Tr. p. 99. The giving of mementos of limited value did not constitute mismanagement. Further, our conclusion that Jerry did not mismanage the estate is bolstered by the fact that once it became known to him that there were concerns about the fair distribution of property, he arranged for an outside appraisal of Reba's remaining items of property and then conducted, with the approval of the other heirs, a drawing and a family auction. *Id.* at 19-20.³

Bill and Dean also contend that Jerry engaged in self-dealing. In support of this claim, they point to Jerry's purchase of the late-discovered safe for \$50, use of the KFC gift certificates, and temporary possession of cookbooks and a string holder. *Id.* at 199. We note initially that, although Jerry admitted that he used the KFC gift certificates, there is no dispute that he reimbursed the estate for their \$20 value. *Id.* at 24. Jerry gained nothing from this transaction, and it does not constitute self-dealing. Additionally, there is no question that the cookbooks and string holder in question spent some time in Jerry's home after he removed them from Reba's house, but, once he received an inquiry as to their whereabouts, he presented them to the other heirs. *See id.* at 18, 28-29, 55. Thus, in regard to the books and string holder, there is simply no evidence of self-dealing.

³ To the extent that Bill and Dean argue on appeal that Jerry's failure to pursue repayment of an alleged loan made by Reba to a grandson constitutes a breach of fiduciary duty, this argument is waived because it was not presented in the petition for Jerry's removal as personal representative, nor was it argued during the hearing. *See* Appellants' App. p. 22. An issue raised for the first time in an appellate brief is waived. *McSwane v. Bloomington Hosp. & Healthcare Sys.*, 882 N.E.2d 244, 249 (Ind. Ct. App. 2008).

Finally, the argument that Jerry engaged in self-dealing in buying the safe for \$50 also fails. In Indiana, “in the absence of a family settlement or agreement . . . ‘a probate personal representative of the deceased is a trustee of the estate assets and will not be permitted to purchase the property himself as an individual from himself as the personal representative.’” *Williamson v. Williamson*, 714 N.E.2d 1270, 1274 (Ind. Ct. App. 1999) (quoting *Estate of Garwood*, 272 Ind. 519, 400 N.E.2d 758, 764 (1980)), *reh’g denied, trans. denied*. Here, Reba’s heirs agreed to hold a family auction at which all of them, including Jerry, could purchase items from the estate. While this safe was located and purchased after the auction, Bill and Dean make no argument that Jerry lacked the permission of the other heirs to buy this item from the estate, and we therefore presume that he did have permission. Rather, the appellants argue only that one of the heirs objected to the price that Jerry paid for the safe. *See* Appellants’ Br. p. 20. However, the evidence makes clear that this price was not arbitrary or self-serving; rather, when Jerry located the safe he valued it at \$50 because Dean paid \$50 for a similar safe during the family auction. Tr. p. 53-54; Pet. Exh. 2 p. 3. Jerry then divided the safe’s contents for equal distribution among the heirs. Tr. p. 52-53. There is absolutely no hint of impropriety in this transaction. *See Williamson*, 714 N.E.2d 1270, 1274 (“The policy behind the prohibition on the transfer of estate property by the personal representative to himself or herself is to eliminate any hint of impropriety or fraud.”). Further, Jerry expressed a willingness to transfer the safe to any other heir for the price paid. Tr. p. 54. The evidence does not support a finding of self-dealing.

II. Whether Jerry Is an Unsuitable Personal Representative

Bill and Dean also contend that Jerry's alleged breach of fiduciary duty created discord within the family such that Jerry is now an unsuitable personal representative and should be removed from the role. *See* I.C. § 29-1-10-6. Our determination that Jerry has not mismanaged the estate is not, by itself, fatal to this argument, as "[u]nsuitableness of one to act as a fiduciary may exist although actual misconduct or dereliction of duty is not shown." *Estate of Baird v. Milford*, 408 N.E.2d 1323, 1328 (Ind. Ct. App. 1980). The issue instead is whether the personal representative "act[s] with fidelity and [is] able to carry out the duties of his office efficiently." *In re the Guardianship of Brown*, 436 N.E.2d 877, 887 (Ind. Ct. App. 1982).

Again, the standard by which we review the trial court's denial of Bill and Dean's petition for Jerry's removal is whether the evidence is *without conflict* and leads only to the conclusion opposite that reached by the trial court. *Grubnich*, 746 N.E.2d at 119. The evidence offered in support of Bill and Dean's claim has to do with the poor communication from Jerry following their complaints to him about his distribution of mementos and suspicions regarding missing items. While Bill and Dean correctly point out that "animosity and disagreements which exist between the personal representative and the legatees of the estate . . . can render a personal representative unsuitable to serve in that capacity," Appellants' Br. p. 24, our cases that have found a personal representative unsuitable on this basis have done so because the animosity interfered with the "orderly administration of the estate," *Estate of Jaworski v. Jaworski*, 479 N.E.2d 89, 91-92 (Ind. Ct. App. 1985), *reh'g denied, trans. denied*; *Baird*, 408 N.E.2d at 1329.

While the evidence in this case undeniably reflects strained communication between Jerry and two of his siblings, it does not lead solely to the conclusion that animosity has hindered the orderly administration of Reba's estate to the extent that he should be removed as personal representative. This is so because many of the necessary duties of the personal representative were completed by Jerry long before Bill and Dean sought removal. Specifically, items of value were inventoried, appraised, and distributed via a family drawing and auction, which was the approach chosen during a family meeting. While there were some questions about items allegedly missing from the inventory and auction, Bill and Dean have not presented any evidence of wrongdoing by Jerry in regard to these items. The trial court did not abuse its discretion in rejecting this argument.

Conclusion

The evidence does not lead undeniably to findings that Jerry breached his fiduciary duty to the estate by distributing mementos of limited monetary value, engaged in self-dealing, or is an unsuitable personal representative. Therefore, we conclude that the trial court did not abuse its discretion by denying the petition for Jerry's removal as personal representative of Reba's estate.

We affirm.

SHARPNACK, J., and BARNES, J., concur.